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GODELL PARKING SDN BHD v. MAJLIS BANDARAYA PETALING JAYA

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
B SURAYA OTHMAN JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-636-11-2018]
3 FEBRUARY 2020

C ***CONTRACT:*** *Agreement – Concession agreement – Termination – Whether lawful – Concession agreement entered between company and local government to run street parking collection system – Whether there was breach of terms of concession agreement in respect of company's exclusivity of concession areas – Whether company sole and exclusive concession holder – Whether concession agreement could be terminated without prior recourse to mandatory mediation* D *process under cl. 11 of concession agreement*

The appellant ('plaintiff') was a company in the business of operating, maintaining and managing street parking and off-street parking bays/areas while the respondent ('defendant') was the local government for the city of Petaling Jaya ('PJ'). By a letter of offer, the State Government of Selangor E offered the plaintiff to take over the street parking collection system ('collection system') in the city of PJ. The plaintiff accepted the offer and entered into a memorandum of understanding with the State Government of Selangor. Subsequently, the plaintiff entered into a concession agreement ('CA') with the defendant to run the collection system for a period of F 20 years, commencing from 1 January 2000. Pursuant to cl. 2.4.1 of the CA, the plaintiff shall pay a monthly rental of a certain amount to the defendant until the expiry of the concession period. Subsequently, there appeared to be issues with the plaintiff's failure to pay up the said monthly rentals in full beginning March 2016. Consequently, three notices of default were issued by G the defendant to the plaintiff, where the defendant specified that (i) the plaintiff failed to make full payment of the monthly rental in breach of cl. 2.4 of the CA; (ii) the plaintiff had neglected to maintain the parking equipment and facilities in the parking areas under its management, including the P&D system in breach of cls. 2.1, 3.2(a) and 5.2(b) of the CA; and (iii) the plaintiff failed to maintain the marking lines of the parking bays and H the parking signage in the parking areas under its management in a good and visible condition in breach of cls. 5.2(a) and (c) of the CA. The plaintiff responded that the said notice of default was unlawful and unsustainable due to the defendant's antecedent breaches of cls. 2.1, 3.3(d), 3.3(e) and 6.2 of the CA, which were the defendant's (i) alleged lack of enforcement activities; I (ii) alleged breach of the CA by managing new parking areas on its own

although the parking areas were within the concession areas under the CA; and (iii) failure to maintain a committee pursuant to cl. 4.5 of the CA, causing the plaintiff to not have a platform to discuss and solve issues pertaining to the parking system within the defendant. Following the failure of the plaintiff to rectify the said defaults with the period stated, the defendant terminated the CA *vide* notice of termination pursuant to cl. 10.3.1 of the CA. The plaintiff countered that the said termination of the CA was unlawful and demanded the payment of RM21,190,530.76 as damages. The defendant denied the said allegation and counter-demanded a sum of RM5,271,390.70 being the outstanding monthly rental charges owing by the plaintiff to the defendant. The plaintiff commenced an action against the defendant in the High Court, alleging that the said termination of the CA was unlawful, and claimed damages for the alleged loss of profit suffered by it. It was also the plaintiff's allegation that the defendant failed to refer the parties' dispute to the State Government of Selangor for mediation before terminating the CA pursuant to cl. 11 of the same. The defendant also mounted a counterclaim against the plaintiff for, *inter alia*, the outstanding monthly rentals due to them under the CA. The High Court held that the plaintiff defaulted and failed to comply with the notice of default, thus the notice of termination was hence validly issued by the defendant. The plaintiff appealed against the said decision. The issues that arose were (i) whether there was a breach of the terms of the CA by the defendant in respect of the plaintiff's exclusivity of the concession areas being the sole and exclusive concession holder pursuant to cls. 2.1 and 3.3(d) of the CA; and (ii) whether the CA could be terminated without prior recourse to mandatory mediation process under cl. 11 of the CA of the dispute forming the basis of the notice of termination and the actual termination thereafter.

Held (dismissing plaintiff's appeal with costs)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The allegation that the defendant had breached cls. 2.1 and 3.3(d) of the CA was not raised as a separate and independent cause of action. Instead, the plaintiff's pleaded cause of action was premised on its allegation that the defendant had unlawfully terminated the CA, causing the plaintiff to suffer huge losses. The allegation that the defendant had breached cls. 2.1 and 3.3(d) of the CA was only raised by the plaintiff to explain why it could not meet the monthly rental payments that was due to the defendant under the CA. Clearly, the plaintiff's cause of action was not anchored upon the alleged breach of cls. 2.1 and 3.3(d) committed by the defendant. The alleged breach was utilised to justify the plaintiff's failure to meet its monthly rental commitments. The plaintiff was thus bound by the terms of its own pleading. The law is trite that the court should not decide a case on a cause of action that was not pleaded. (paras 45, 46 & 48)

(2) It could not be the correct legal position that the defendant could not create new parking areas under the CA if the plaintiff for one reason or another, was not able to comply with the defendant's request to operate new parking areas in the concession area within a reasonable time. Under the CA (in particular cls. 2.1 and 3.3(d), the defendant's obligation was only to offer new parking areas to the plaintiff subject to the rider that the plaintiff was prepared and willing to commence the operation, management and maintenance of the new areas within a reasonable time. What was deemed to be a reasonable time was a question of fact. It was dependent upon many factors, and it was best left to the wisdom of the defendant to determine so, regard being had to the circumstances of the case. It could not therefore be the law that the defendant was compelled to wait until the plaintiff was ready or willing to take over the management of the said new parking areas. Once the plaintiff had expressed its inability to take over new parking areas or had rejected an offer to manage a newly gazetted parking area, the defendant was now at liberty to decide how it wished to manage the new parking areas. The plaintiffs' contention that there was a continuous breach of cls. 2.1 and 3.3(d) of the CA on account of the defendant's failure or refusal to hand over the management of the said new parking areas to the plaintiff had no basis in law. The contention was untenable. (paras 50-52)

(3) The defendant had taken over the management of the new parking areas only because of the plaintiff's failure or inability to do so within a reasonable time upon being so requested by the defendant. The defendant had to carry out the management of the new areas by itself in mitigation of the plaintiff's failure or inability to take over the same within a reasonable time when requested to do so by the defendant. The plaintiff itself was in breach of the CA on account of its failure to comply or honour the requirements of the terms of cls. 2.1 and 3.3(d) of the CA. Thus, there was no basis in the plaintiff's contention that the defendant had breached the terms of cls. 2.1 and 3.3(d) of the CA when it took over the operation and management of the new parking areas. The defendant had not breached the plaintiff's exclusive right as the sole and exclusive concession holder of the concession area pursuant to the said clauses. (paras 53 & 59)

(4) Clause 10 of the CA is a contractual termination clause that sets out the procedure for the contractual termination of the CA on account of non-compliance of its terms. There is no requirement for any party to invoke cl. 11 before that party/defendant is allowed to terminate the CA (under cl. 10.3.1). Clause 10 deals with the defendant's right to terminate the CA and regulate the termination procedure without any reference to

cl. 11. Clauses 10 and 11 are independent or stand-alone provisions. The termination under cl. 10 must first occur before cl. 11 can be invoked to resolve any dispute concerning the termination. If the plaintiff challenges the validity of the termination of the CA pursuant to cl. 10, then a dispute with regard to the said termination will arise or has indeed arisen between the parties. Then either party may submit the dispute for resolution in accordance with the dispute resolution procedures in cl. 11. The purport of the procedures involved is further indication that cls. 10 and 11 cannot be interdependent. (paras 95 & 101)

(5) The entire dispute resolution procedure in cl. 11 would require a minimum of 90 days to complete. This would mean that until the dispute resolution procedure is completed, the plaintiff can nonchalantly continue with its default for a period of 90 days and the defendant would not be allowed to take any steps to mitigate the defaults of the plaintiff until the period of 90 days expires. The defendant is the local authority for PJ. It has statutory obligations, duties and responsibilities to the public and must ensure that there are adequate parking facilities within PJ for use by the public. It could not wait 90 days or more for the completion of the dispute resolution procedure before it can take action to address the issues which may arise in respect of the parking facilities. In the circumstances of the case, the defendant had properly applied cl. 10 to terminate the CA without the need to have prior recourse to cl. 11. Verily, the termination was lawful. (paras 102, 103 & 109)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Delta Enterprises Sdn Bhd & Ors v. Asia Commerical Finance (M) Bhd & Anor [2004] 1 LNS 601 CA ***(refd)***

Safety Insurance Company Sdn Bhd v. Chow Soon Tat [1974] 1 LNS 146 FC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(dist)***

Legislation referred to:

Limitation Act 1953, s. 6

For the appellant - K Selva Kumaran & Yau Jie Luan; M/s Rose Hussin

For the respondent - Kenny Chan Yew Hoong, Yatiswara Ramachandran & Shafrina Mohd Shahidan; M/s Azman Davidson & Co

[Editor's note: For the High Court judgment, please see Godell Parking Sdn Bhd v. Majlis Bandaraya Petaling Jaya [2018] 1 LNS 1767 (affirmed).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Ahmadi Asnawi JCA:

[1] The parties will be referred to as they were in the court below where the appellant herein, Godell Parking Sdn Bhd, was the plaintiff and the respondent, Majlis Bandaraya Petaling Jaya was the defendant.

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[2] The plaintiff is a company incorporated under the Companies Act 1965, and was in the business of operating, maintaining and managing street parking and off-street parking bays/areas.

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[3] The defendant is a local government established under the Local Government Act 1976, and is the local government for the city of Petaling Jaya.

[4] By a letter of offer dated 26 May 1998, the State Government of Selangor offered the plaintiff to take over the street parking collection system (collection system) in the city of Petaling Jaya.

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[5] The plaintiff accepted the offer and on 10 September 1998 entered into a memorandum of understanding with the State Government of Selangor to take over the said collection system.

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[6] Subsequently on 5 August 1999, the plaintiff entered into a concession agreement ("CA") with the defendant to run the collection system for a period of 20 years, commencing from 1 January 2000 (see – pp. 1 to 70, vol. 1, common core bundle of documents ("CCBD")).

[7] Pursuant to cl. 2.4.1 of the CA, the plaintiff shall pay a monthly rental of a certain amount to the defendant until the expiry of the concession period.

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[8] The monthly rental rate was computed based on the number of parking bays operated, managed and maintained by the plaintiff during the particular month.

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[9] The monthly rental was required to be paid by the plaintiff not later than the 15th day of each month.

[10] In addition, pursuant to cl. 2.5.1(a) of the CA, the monthly rental for each of the parking bay rendered unusable shall be waived, proportionate to the number of days the parking bays were obstructed.

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[11] There appeared to be issues with the plaintiff's failure to pay up the said monthly rentals in full beginning March 2016.

[12] Consequently, three notices of default were issued by the defendant to the plaintiff, the first dated 29 August 2016 (at pp. 135-140, vol. 1, CCBD); the second notice was dated 22 February 2017 (at pp. 216-221, vol. 1, CCBD) and the third one being on 24 May 2017 (at pp. 235-240, vol. 1, CCBD) wherein the defendant specified that:

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(i) the plaintiff had failed, refuse and/or neglected to make full payment of the monthly rental in breach of cl. 2.4 of the CA. The accumulated outstanding rental due to the defendant as at 24 May 2019 stood at RM6,948,108.94;

(ii) the appellant failed, refused, and/or had neglected to maintain the parking equipment and facilities in the parking areas under its management, including the P & D system in breach of cls. 2.1, 3.2(a) and 5.2(b) of the CA; and

(iii) the plaintiff had failed, refused and/or had neglected to maintain the marking lines of the parking bays and the parking signage in the parking areas under its management in a good and visible condition in breach of cls. 5.2(a) and (c) of the CA.

[13] The plaintiff was given 15 days from the date of receipt of the said notice of default (24 May 2017) to rectify the default.

[14] As was with the previous notices, on 5 June 2017, the plaintiff responded that the said notice of default was unlawful and unsustainable due to the defendant's antecedent breaches of cls. 2.1, 3.3(d), 3.3(e) and 6.2 of the CA, that is to say:

(i) the defendant's alleged lack of enforcement activities;

(ii) the defendant's alleged breach of the CA by managing new parking areas on its own although the parking areas were within the concession areas under the CA; and

(iii) the defendant's failure to maintain a committee pursuant to cl. 4.5 of the CA, causing the plaintiff not having a platform to discuss and solve issues pertaining to the parking system with the defendant.

[15] Following the failure of the plaintiff to rectify the said defaults within the period stated therein, on 22 June 2017, the defendant terminated the CA *vide* notice of termination (dated 22 June 2017) pursuant to cl. 10.3.1 of the CA (see pp. 261-261, vol. 1, CCBD).

[16] On 10 August 2017, the plaintiff through its solicitors, countered that the said termination of the CA was unlawful and demanded the payment of RM21,190,530.76 as damages due to the alleged unlawful termination (see letter at pp. 272-274, vol. 1, CCBD).

[17] The defendant denied the said allegation on 11 August 2017 and counter demanded a sum of RM5,271,390.70 being the outstanding monthly rental charges owing by the plaintiff to the defendant (see pp. 275-276, vol. 1 CCBD).

[18] On 21 September 2017, the plaintiff commenced an action against the defendant in the High Court, the gist of which is the allegation that the said termination of the CA was unlawful on account of the issues enumerated in para. [14] above. The plaintiff claimed damages for the alleged loss of profit suffered by it due to the alleged unlawful termination of the CA.

[19] It was also the plaintiff's allegation that the defendant had failed to refer the parties' dispute to the State Government of Selangor for mediation before terminating the CA pursuant to cl. 11 of the same. Hence, it was the plaintiff's allegation that the defendant's notice of termination did not comply with the aforesaid requirement of the CA.

[20] In essence, the plaintiff claimed, amongst others:

(i) a declaration that the termination of the CA between the plaintiff and defendant is unlawful and void;

(ii) special damages amounting to RM21,190,503.76;

(iii) general damages;

(iv) exemplary damages;

(v) interest on the damages at a rate of 5% from date of judgment until full settlement.

[21] The defendant had also mounted a counter-claim against the plaintiff for the outstanding monthly rentals due to them under the CA, the particulars of which are shown at para. 27(a) to (h), pp. 122-124 rekod rayuan ("RR"), Bahagian A, in particular the sum of RM5,681,334.29 (made up of RM7,457,735.89 in respect of outstanding monthly rentals and RM409,943.59 in late payment interest as at 2 November 2017 and less RM2,186,345.19 for the encashment of the three bank guarantees and forfeiture of cash deposit provided by the plaintiff pursuant to cls. 2.2 and 2.3 of the CA).

Decision Of The High Court

[22] The learned trial judge found that cl. 11 of the CA was not a precondition to the issuance of notice of termination. Instead, the preconditions were (i) the occurrence of the default(s) set out in cl. 10.1(a) of the CA, and (ii) the issuance of the notice of default by defendant requiring the plaintiff to rectify the said default(s).

[23] The learned judge also found that the plaintiff had defaulted and failed to pay the monthly rentals in breach of cl. 2.4.1 of the CA. In fact, the learned judge found that the appellant had admitted that at least RM5,021,132.73 were undisputedly due and owing by it to the defendant.

[24] The learned judge also found that:

(i) the plaintiff had failed to ensure that the Pay and Display System ("P & D") was in manageable, operational, functional and good condition;

(ii) the plaintiff had failed to maintain the marking lines of the parking bays and parking signage in the parking areas in a good and visible condition;

(iii) there was no evidence to show that the defendant was lacking in enforcement activities;

(iv) there was nothing in the CA suggesting that it is mandatory for the defendant to set up committee meetings with the plaintiff. This matter also had nothing to do with enforcement activities or payment of the rental under the CA;

(v) there was no breach of cls. 2.1 and 3.3(d) of the CA by the defendant when it took over the management of the new parking areas within the concession area on or about March 2011. This matter is also barred under s. 6 of the Limitation Act 1953;

(vi) the plaintiff had failed to comply with the notice of default and the notice of termination was hence validly issued by the defendant.

The Appeal Before Us

[25] The plaintiff raised only two issues:

(i) whether there is a breach of the terms of the CA by the defendant in respect of the plaintiff's exclusivity of the concession areas being the sole and exclusive concession holder pursuant to cls. 2.1 and 3.3(d) of the CA?

(ii) whether the CA can be terminated without prior recourse to mandatory mediation process under cl. 11 of the CA of the dispute forming the basis of the notice of termination and the actual termination thereafter?

First Issue: Exclusivity Of The Concession Area

[26] The plaintiff submitted that its main ground of appeal is primarily based upon the contention that the defendant has breached cls. 2.1 and 3.3 (d) of the CA.

[27] Clause 2.1 of the CA states that:

> 2.1 Grant of Concession
>
> Subject to the terms and conditions of this Agreement and the provisions of the Act and the Company's compliance with those terms, conditions and provisions, the Council hereby grants the Company the sole and exclusive rights to take over the operation management and maintenance

of the Parking Places, the Parking Bays thereof and the available parking facilities therein in accordance with this Agreement and to that end, the Company is entitled to:

(a) Carry out the Installation Works;

(b) Test and commission any New Facilities and the Existing Facilities;

(c) Demand, collect and retain the Charges from the customers;

(d) Make any recommendations to the Council on any matters which may benefit the Council, the Company and the customers without any obligation on the Council to accept such recommendations; and

(e) Do all other matters or things as may be necessary or incidental to the matters referred to in paragraphs (a), (b), (c) and (d) subject to the Council's approval which approval shall not be unreasonable withheld.

For and within the Concession Area and during the Concession Period and in return, the Company shall pay the Council's Consideration at the time and in the manner referred to in Clause 2.4.

[28] Meanwhile, cl. 3.3(d) provides:

3.3 Council's Covenants.

The council hereby undertakes:

(a) …

(b) …

(c) …

(d) Not to contract out to any other parties the operation and management of any Parking Bays or Parking Places or grant similar concession rights to any other persons or parties after the Effective Date until the Concession Expiry Date; and …

[29] Based upon the clauses referred to above, it is the contention of learned counsel for the plaintiff that the plaintiff has been awarded an exclusive right to operate, manage and maintain the facilities and services of the parking system (in the concession area) whereupon the defendant thence has no right to take over new parking areas, within the said concession area.

[30] Hence, it is the plaintiff's case that the defendant has in fact breached its obligation under the CA when it took over the new parking areas within the concession area in March 2011, in contravention of cl. 2.1 of the CA.

[31] The chronology of the events leading to the defendant's move to take over the new parking areas started when the defendant issued a letter to the plaintiff dated 22 April 2010 (at pp. 75-76, vol. 1, CCBD) requesting the

plaintiff to operate and implement the parking system in the new parking areas within the concession area (see Government *Gazette* dated 29 April 2010 at pp. 77-80, vol. 1, CCBD, for its location). A

[32] The plaintiff responded by letter dated 3 May 2010 (at pp. 81-84, vol. 1, CCBD) that a detailed research was required to be done and suggestions of actions to be taken before the implementation of the parking system in the new parking areas. B

[33] Down the timeline, the plaintiff had also suggested to commence the implementation of the parking system in the new parking areas in July 2011.

[34] Subsequently, the defendant issued a letter dated 6 July 2010 (at pp. 107-108, vol. 1, CCBD) informing the plaintiff that its proposal to only commence the implementation of the parking system in the new parking areas in July 2011 was rejected. C

[35] The plaintiff in its reply dated 9 July 2010 (at pp. 109-113, vol. CCBD) had further informed the defendant that it could not implement the parking system in the new parking areas because most of the areas were yet to be gazetted. D

[36] Notwithstanding the same, the defendant proceeded to take over the operation, management and maintenance of the new parking areas in March 2011. E

[37] It was the plaintiff's submission that they were not informed that it was too late for the plaintiff to take over the new parking areas in July 2011.

[38] The plaintiff was also not informed of the reason of rejection of its proposal to operate and manage the new parking areas in July 2011. F

[39] Also, it was contended that the plaintiff's suggestion on the implementation of the parking system in the new parking area was defined to be not reasonable by the defendant.

[40] It was also submitted that the defendant had taken approximately nine months to fully implement the parking system in the new parking areas (in March 2011) which was not much different from the plaintiff's suggested timeline to implement the system in July 2011. G

[41] The plaintiff equally submitted that there is a public policy that the grantor of the concession cannot simply take over bits and portions of the concessions as it will deter future investment by potential concession holders. H

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[42] It was finally submitted that the plaintiff has never rejected the defendant's request to take over the new parking areas within the concession area. In fact, the plaintiff was ready and willing to take over the new parking areas. The defendant in fact had breached cls. 2.1 and 3.3(d) of the CA upon which the plaintiff was granted the sole and exclusive concession holder of the parking areas under the CA. The defendant cannot take over the new parking areas within the concession area in any event.

[43] Hence, it was submitted that the learned trial judge erred when he found that the plaintiff had refused to take over the new parking areas – see para. 41, grounds of judgment, at p. 73, RR (Bahagian A).

[44] Further, it was contended that the defendant was in continuous breach of cls. 2.1 and 3.3(d) of the CA. Whilst conceding that the plaintiff's right to damages may be limited to the last six years prior to the commencement of the action, the cause of action continues to be alive for so long as the defendant continued to be in breach of the said provision of the CA.

Our Decision In Respect Of The First Issue

[45] We were with learned counsel for the defendant's submission that the allegation that the defendant had breached cls. 2.1 and 3.3(d) of the CA was not raised as a separate and independent cause of action. Instead, the plaintiff's pleaded cause of action was premised on its allegation that the defendant had unlawfully terminated the CA, causing the plaintiff to suffer huge losses. Paragraph 19 of plaintiff's statement of claim ("SOC") (at p. 88, RR (Bahagian A)) is clearly on point. It states:

> 19. Akibat penamatan Perjanjian Tersebut secara salah oleh Defendan, Plaintiff telah mengalami kerugian yang mana butirannya ada seperti pada penyata Butir-Butir Kerugian.

[46] The allegation that the defendant had breached cls. 2.1 and 3.3(d) of the CA was only raised by the plaintiff to explain why it could not meet the monthly rental payments that were due to the defendant under the CA. Paras. 9 and 10 of the plaintiff's SOC specifically plead the alleged breach and its effect upon the plaintiff's financial position.

[47] Paragraphs 9 and 10 of the SOC state:

> 9. Defendan sebaliknya telah melakukan pelanggaran atau kemungkiran Perjanjian Tersebut, secara berterusan antara lain seperti berikut:
>
> a. …
>
> b. Defendan telah, sejak 2011, menguruskan beberapa tempat letak kereta di Petaling Jaya walau pun ianya di kawasan yang diperuntukkan dalam konsesi perjanjian tersebut dan perjanjian tersebut belum luput tempohnya;
>
> c. …

10. Akibat kegagalan dan kemungkiran yang dinyatakan di atas, plaintiff telah mengalami kerugian dalam bentuk pengurangan hasil dari operasi letak kereta. Ini menjejaskan kemampuan plaintiff membuat bayaran sewa tetap kepada defendan di bawah perjanjian tersebut.

[48] Clearly, the plaintiff's cause of action was not anchored upon the alleged breach of cls. 2.1 and 3.3(d) committed by the defendant. The alleged breach was utilised to justify the plaintiff's failure to meet its monthly rental commitments. The plaintiff is thus bound by the terms of its own pleading. The law is trite that the court should not decide a case on a cause of action that was not pleaded.

[49] The undisputed facts showed that the plaintiff's offer to start operating, managing and maintaining the new parking areas effective from July 2011 was rejected by the defendant. The offer by the defendant was made in April 2010. Presumably the defendant could not wait that long in the interest of the public. Hence, what are the options now available to the defendant?

[50] We were again with the defendant's submission that it could not be the correct legal position that the defendant could not create new parking areas under the CA if the plaintiff for one reason or another, was not able to comply with the defendant's request to operate new parking areas in the concession area within a reasonable time.

[51] We opined that under the CA (in particular cls. 2.1 and 3.3(d)), the defendant's obligation is only to offer new parking areas to the plaintiff subject to the rider that the plaintiff is prepared and willing to commence the operation, management and maintenance of the new areas within a reasonable time. What is deemed to be a reasonable time is a question of fact. It is dependent upon many factors and, in our view, it is best left to the wisdom of the defendant to determine so, regard being had to all the circumstances of the case. It cannot therefore be the law that the defendant is compelled to wait until the plaintiff is ready or willing to take over the management of the said new parking areas. Once the plaintiff, for one reason or another, had expressed its inability to take over new parking areas or had rejected an offer to manage a newly gazetted parking area, the defendant is now at liberty to decide how it wished to manage the new parking areas.

[52] In our view, the plaintiff's contention that there was a continuous breach of cls. 2.1 and 3.3 (d) of the CA on account of the defendant's failure or refusal to hand over the management of the said new parking areas to the plaintiff has no basis in law. The contention is untenable following the fact that there was no such refusal or failure by defendant in the first place.

[53] We agreed that the defendant took over the management of the new parking areas only because of the plaintiff's failure or inability to do so within a reasonable time upon being so requested by the defendant. The defendant had to carry out the management of the new areas by itself in mitigation of the plaintiff's failure or inability to take over the same within a reasonable time when requested to do so by the defendant. It looks like the plaintiff itself was in breach of the CA on account of its failure to comply or honour the requirements of the terms of cls. 2.1 and 3.3(d) of the CA.

[54] It is worthy to note that after the defendant took over and managed the new parking areas in March 2011, the plaintiff never raised any issue or disclosed any intention to re-take over the said parking areas. The issue of the said purported breach by the defendant in taking over the management of the new parking areas was only raised more than six years later *vide* the plaintiff's letter dated 13 September 2016 (at pp. 141-166, vol. 1, CCBD). Even so, there is no allegation in this letter of a continuing obligation on the part of the defendant to hand over the said parking areas to the plaintiff nor any demand or intention to re-take over the said parking areas. It would not be just to allow the plaintiff after a lapse of more than six years to now insist that the defendant has been in continuous breach of cls. 2.1 and 3.3(d) of the CA. From the facts, such claim appears most likely to be an afterthought.

[55] On the plaintiff's contention that the 13 new parking areas that it was requested to take over had not be gazetted, the Government *Gazette* dated 29 April 2010 revealed that in fact all the said 13 new parking areas had all been gazetted on the same instant (29 April 2010). This is nearly three months before the plaintiff's letter dated 9 July 2010, highlighting and complaining that the new parking areas had not been gazetted. The said *Gazette* is at pp. 77-80, vol. 1, CCBD.

[56] The plaintiff also submitted that the defendant did not inform the plaintiff of the reason why its proposal to implement the parking system in the new parking areas was rejected. The defendant's letter dated 6 July 2010 made it clear that the plaintiff's proposal to implement the collection of fees at the new parking areas from July 2011 was rejected by the defendant.

[57] In our view, the plaintiff's letter or reply dated 9 July 2010 clearly showed that the plaintiff was aware that the reason for the rejection was due to the late implementation of the parking system at the new parking areas when the plaintiff said that they could not hasten the said implementation on account that most of the areas have yet to be surrendered to the defendant and equally, has yet to be gazetted. In the same vein, the plaintiff had also said that they were prepared "… untuk mengemukakan cadangan pelaksanaan kepada Majlis bagi kawasan-kawasan yang telah diwartakan

dengan cadangan tarikh pelaksanaan yang lebih awal …" The said letter by the plaintiff verily is self-revealing, that is to say, the plaintiff was aware of the reasons why its proposal to implement the parking system at the new areas in July 2011 was rejected by the defendant.

[58] The plaintiff obviously did not plead the public policy issue that the grantor of the concession cannot simply take over bits and portions of the concession area less it will deter future investments by potential concession holders. Neither was the same raised before the High Court nor raised in the plaintiff's memorandum of appeal. In such event, it is highly irregular for the plaintiff to ventilate the same before us at this stage.

[59] For all the reasons given, we opined that there is no basis in the plaintiff's contention that the defendant had breached the terms of cls. 2.1 and 3.3(d) of the CA when it took over the operation and management of the new parking areas. The defendant has not breached the plaintiff's exclusive right as the sole and exclusive concession holder of the concession area pursuant to the said clauses.

Second Issue: Unlawful Termination Of The CA

[60] Now, the plaintiff submitted that there existed real disputes in respect of issues relating to: (i) the payments of monthly rentals in breach of cl. 2.4 of the CA; (ii) issues of maintenance of parking equipment and facilities and the P & D system in breach of cls. 2.1, 3.2 (a) and 5.2 (b) of the CA; and (iii) issues of maintenance of marking lines of the parking bays and parking signage in breach of cls. 5.2 (a) and (c) of the CA. These were the issues leading to the issuance of the several notices of default by the defendant.

[61] According to the plaintiff, since disputes have arisen, it follows that the same should and must be resolved pursuant to the mechanism set out in cl. 11 of the CA. Hence, according to the said clause, the defendant must first refer the disputes to the State Government for its resolution. Any move by the defendant to terminate the CA without first referring the disputes to the State Government would amount to a breach of cl. 11(b) of the CA, rendering the said termination unlawful.

[62] The defendant denied the allegations as in para [60] above and also denied that the reference of disputes between the parties to the State Government under cl. 11 is a pre-condition required to be fulfilled before default and termination notices can be issued against the plaintiff under cl. 10 of the same.

[63] Learned counsel for the plaintiff submitted that in response to the notices of default issued by the defendant, the plaintiff had through its solicitors, *vide* letters dated 6 March 2017 (at pp. 222-223, vol. 1, CCBD) and 5 June 2017 (at pp. 241-252, at p. 251, vol. 1, CCBD) invited the defendant to refer the said disputes to the State Government of Selangor pursuant to cl. 11 of the CA.

[64] Subsequently, the plaintiff had unilaterally referred the disputes to the State Government *vide* its letter dated 6 June 2017 (at pp. 1586-1600, vol. 7, RR). By letter dated 21 June 2017, the State Government then sought the co-operation of the defendant to comply with the said cl. 11. However, there was no response from the defendant.

[65] Nevertheless, the defendant, through its letter dated 22 June 2017 (at pp. 253 to 260, vol. 1, CCBD) replied to the plaintiff's letter dated 5 June 2017, denying the alleged breaches and registered its refusal to refer the so-called disputes to the State Government.

[66] Further, on the same day, the defendant issued a notice of termination (letter dated 22 June 2017 at pp. 261-262, vol. 1, CCBD) to terminate the CA if the plaintiff failed to rectify the defaults within 15 days of receipt of the said notice.

[67] The plaintiff responded, *vide* its letter dated 3 July 2017 (at pp. 1629-1630, vol. 7, RR), amongst others, again urging the defendant to refer the disputes to mediation as required by cl. 11 of the CA.

[68] The defendant in its reply *vide* letter dated 7 July 2017 (at pp. 1633 -1637, vol. 7, RR) again denied that there is a dispute in relation to the issues culminating in the issuance of both notice of default and notice of termination and maintaining its position that the termination of the CA is valid and the plaintiff is at liberty to refer the said termination to the State Government if the plaintiff had wanted to dispute the said termination.

[69] It was hence the plaintiff's case before us that the termination of the CA is unlawful because the notice of termination was issued without first resolving the disputes between the parties amicably by referring the same to mediation as provided under cl. 11 of the CA.

[70] However, the defendant is adamant that in issuing the notice of termination of the CA, they were in fact acting under the provision of cl. 10 of the same, which is independent of the long arms of cl. 11.

[71] In view of the divergence, the court's main poser to both sides of the divide is this: whether cl. 10 is a stand-alone clause, independent of c. 11 of the CA and whether, before termination is made, a dispute within cl. 11 should mandatorily be referred to the State Government.

[72] For ease of reference, we reproduce the relevant portions of both the clauses. A

[73] Clause 10 provides:

10.1 Default of the Company.

Save as otherwise provided in this agreement, if: B

(a) The company:

(i) fails to comply with any of the terms and conditions of this agreement herein, or

(ii) fails to take over the Existing Facilities on the Takeover Date; C

(iii) fails to pay the monthly rental specified in the Agreement;

(b) the Company:

(i) has a winding up order made against it; or

(ii) becomes insolvent or compounds with or makes arrangements with its creditors, or goes into liquidation whether voluntarily (save for the purpose of permitted amalgamation or reconstruction) or compulsorily; or D

(iii) was a provisional liquidator, receives and/or manager appointed in respect of its business or undertaking or possession of its property is taken by or on behalf of creditors or debenture holders secured by a floating charge, then the provisions of clause 10.2 shall apply. E

10.2 Default Notice

10.2.1 Occurrences of Events other than insolvency. F

Upon occurrences of any of the events set out in paragraph (a) of clause 10.1, the Council may give notice in writing to the Company (hereinafter referred to as the "Default Notice") specifying the default and requiring the Company to remedy the default within fifteen (15) day after receipt of the Default Notice or such other reasonable period as specified in the notice as may be determined by the Council. G

10.2.2 Insolvency of the Company.

Upon occurrences of any of the events set out in clause 10.1 (b), the Council may at its absolute discretion either: H

(a) forthwith terminate this agreement; or

(b) give notice in writing to the Company (hereinafter referred to as the "Default Notice") specifying the default and require the Company to remedy the default within fifteen (15) days or such longer period as may be determined by the Council. I

10.3 Failure to remedy default.

10.3.1 If the Company fails to remedy the default specified in the Default Notice, the Company shall terminate this Agreement after the expiry of fifteen (15) days from the date of expiry of the Default Notice.

10.3.2 Where this Agreement is terminated by default of the Company under this section, the possession of the facilities available in the parking bays shall be taken over by the Council and shall not be removed by any other party without prejudice however to the rights of Council to take action against the Company for breach of this Agreement herein.

10.3.3 The Council shall have the right to the continued use of such facilities unless otherwise sooner removes or replaces by the Council.

10.3.4 Nothing herein shall be construed as an Agreement by the Council to take over the liabilities of the Company as a result of its taking possession of such facilities.

…

…

…

[74] Meanwhile cl. 11 states:

11. Amicable Settlement.

(a) If any dispute or difference of any kind whatsoever between the parties hereto during the currency of this Agreement, the parties hereto shall first negotiate in good faith with a view to achieve an amicable settlement of the same.

(b) In the event the Parties hereto are unable to achieve any amicable settlement of the matter or dispute, any party hereto shall be entitled by a notice in writing to the other to require the unresolved matter to be referred to the State Government, who shall use all its reasonable endeavours to resolve the disagreement in the best interest of the Parties hereto. PROVIDED ALWAYS that pending the outcome of the decision of the State Government, the parties hereto shall continue with their responsibilities under this Agreement.

(c) If the State Government shall fail to decide on any matter in dispute referred to them under clause 11(b) within ninety days from the date of such referral or such other period as may be agree to by the Parties hereto or either party is not satisfied with the decision of the State Government, then in any such case either party is at liberty to seek recourse through other legal process including referring the

> matter to arbitration if agreed to by all the Parties hereto to settle the matter or dispute. PROVIDED ALWAYS it is hereby declared and irrevocably agreed to by all the Parties hereto that no party shall be entitled to invoke another process to settle the matter or dispute in question without first having referred the matter or dispute for settlement in accordance with the provisions of clause 11(b) and each party hereto waives its objection as to the enforceability of this clause 11(c) and any claim it may now or hereafter have that this requirement is of no legal effect or force.

Position Of The Plaintiff

[75] The plaintiff took the position that the court should take a purposive approach on the interpretation of the contract to give plausible commercial sense to the construction of the CA. In fortification thereof, learned counsel cited *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, where the Federal Court held:

> [10] … The role of the court is to interpret the contract in a sensible fashion … As Lord Steyn said in *Mannai Investment Co. Ltd v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749 at p. 771:
>
> > In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach Lord Greene MR's judgment in *Hankey v. Clevering* [1942] 2 KB 326 is rigid and formalistic.

[76] We were further referred to *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 where it repeated the principle on the interpretation of the clauses in the agreement set out in *Berjaya Times Squares Sdn Bhd* (*supra*) and added that:

> [41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established it is almost banal. See for instance *Chamber Colliery Ltd v. Twyerould* [1893] [1915] 1 Ch 268 (Note):
>
> > … the application of the well-known (SIC) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if the interpretation does no violence to the meaning of which they are naturally susceptible.

[77] Following the decision in *SPM Membrane* (*supra*) it was hence the submission of learned counsel for the plaintiff that cls. 10 and 11 of the CA should not be read in isolation. Both clauses are dependent upon each other even though the defendant has exercised its rights under cl. 10 to issue a notice of termination in the event the plaintiff failed to remedy the alleged defaults after the issuance of the alleged default notice.

[78] It was further submitted that the defendant is entitled to invoke cl. 10.2 of the CA in the event of default by the plaintiff and to issue the default notice to the plaintiff for the plaintiff to remedy the default within 15 days upon receipt of the default notice.

[79] It is also submitted that in the event the plaintiff failed to remedy the default within the said 15 days, the defendant is entitled to issue a written notice to terminate the CA if there is no dispute brought up by the appellant.

[80] However, the plaintiff herein had, through letters from its solicitors disputed the various notices of default issued by the defendant and had given notice to the defendant to refer the dispute to the State Government (see paras. [63] to [68] above). In such event, the provision of cl. 11(a) should come into play, to be followed by the mechanism in cl. 11(b) if the attempts to amicably settle the disputes under cl. 11(a) had resulted in failures.

[81] It was further submitted that the defendant is bound by the multitiered dispute resolution clause agreed by both the parties. The defendant cannot turn its back on the plaintiff to terminate the CA without first resolving the disputes under cl. 11(a) and (b).

[82] It was also submitted that cl. 11 of the CA used the word "shall" instead of "may", laying down the imperative that the parties are mandatorily obliged to refer the disputes or differences arising during the currency of the CA to the State Government in the event the disputes or differences could not be resolved between the parties amicably. The plaintiff cited *Delta Enterprises Sdn Bhd & Ors v. Asia Commerical Finance (M) Bhd & Anor* [2004] 1 LNS 601; [2004] 2 MLRA 462 in support of its submission. Further, cl. 11(b) is a pre-condition to the initiation of any legal proceeding to resolve the dispute or disputes.

The Position Taken By The Defendant

[83] The defendant is on common ground with the plaintiff that the issue as to whether cls. 10 and 11 of the CA are dependent upon each other is a question of construction of the CA.

[84] In a nutshell, the defendant submitted that cl. 10.3.1 of the CA allows the defendant to terminate the CA if the plaintiff fails to rectify the defaults within the timelines stated in the notices of default issued by the defendant under cl. 10.2.1.

[85] It was also submitted that on a plain reading of cls. 10 and 11 there is no link between them. There is nothing in cl. 10 that requires recourse to be made to the dispute resolution procedure in cl. 11 before the CA can be terminated pursuant to cl. 10.3.1. If recourse to cl. 11 is a condition precedent before the CA could be terminated pursuant to cl. 10.3.1, such a requirement would have been expressly spelt out in cl. 10.3.1 itself. The fact that it is not, clearly shows that cls. 10 and 11 are provisions independent of each other.

[86] The defendant was also in agreement with the plaintiff that "termination" of the CA does indeed fall within the ambit of "dispute or difference".

[87] However, it was the defendant's submission that there can be no dispute concerning the termination of the CA if the termination has not yet occurred. Hence, there is no necessity for dispute(s) to be referred to the State Government under cl. 11 before termination is made under cl. 10.1.3. thereof. In fact, termination under cl. 10 must have occurred first before a dispute concerning the said termination can be referred to the dispute resolution procedure under cl. 11.

[88] The termination under cl. 10 of the CA could therefore be invoked without reference to the State Government under cl. 11 of the same. It is only if the plaintiff were to dispute the said termination that it can be said that there is a dispute that can be referred to the State Government under cl. 11. To interpret otherwise would not have made a commercial common sense of the two clauses.

Our Decision In Respect Of The Second Issue

[89] We were strongly in full agreement with the construction of cls. 10 and 11 of the CA as argued by learned counsel for the defendant enumerated in paras. [84] to [88] above. That would have mirrored our construction of the two clauses. The operationality of cl. 10 is not dependent upon observance of cl. 11. Both clauses are stand-alone clauses that operate independently of each other. Nothing would have barred the defendant from exercising its powers under cl. 10 to issue the notices of default and thereafter to proceed with the issuance of the notice of termination in the event of non-compliance of the said notices of default in total disregard of cl. 11.

[90] The only rider is that, going by the proviso in cl. 11(c), it would prohibit the parties from commencing an action in court without first having referred the matter to the State Government under cl. 11(b). The proviso in cl. 11(c) is rather clear. It provides:

> … PROVIDED ALWAYS it is hereby declared and irrevocably agreed to by all the parties hereto that no party shall be entitled to invoke another process to settle the matter or dispute in question without first having referred the matter or dispute for settlement in accordance with the provisions of clause 11(b) …

[91] Hence, learned counsel for the defendant brought our attention to the ruling in *Safety Insurance Company Sdn Bhd v. Chow Soon Tat* [1974] 1 LNS 146; [1975] 1 MLJ 193, where the Federal Court stated:

> While parties cannot by contract oust the jurisdiction of the courts, they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator. Such a provision is often termed a *Scott v. Avery* clause …
>
> … where a dispute is governed by such condition, an action in respect of that dispute cannot succeed, and no purpose will be served by allowing it to continue …

[92] In amplification of our views expressed in para. [89] (above), the following issues would obviously negate the proposition that cls. 10 and 11 of the CA are interdependent.

[93] Firstly, cl. 10 clearly requires the defendant to fulfil the conditions precedent embedded therein before the defendant is entitled to terminate the CA. In this regard, the learned trial judge is correct in his findings that there are two conditions precedent to be satisfied prior to the issuance of the notice of termination under cl. 10.3.1 of the CA, that is to say, (i) the occurrence of the defaults by the plaintiff as specified in cl. 10.1(a) or (b), and (ii) the issuance of the notice of default under cl. 10.2.1 requiring the plaintiff to rectify those defaults. It is pertinent to note that reference of dispute to the State Government under cl. 11 is not one of those conditions precedent.

[94] Clause 10 is all about the issue of termination and ceasing of the CA, which is clearly spelt out under cl. 10.3.1. The over-arching scheme of cl. 10 provided that if the company/plaintiff fails to comply with any of the terms and conditions of the CA or fails to pay the monthly rental specified thereof, then the Council/defendant may issue default notice to the plaintiff and thereafter terminate the CA if the plaintiff fails to remedy the default(s) stated in the notice within 15 days of receipt of the said notice (see cls. 10.1 and 10.2).

[95] In our view, cl. 10 is a contractual termination clause that sets out the procedure for the contractual termination of the CA on account of non-compliance of its terms. There is no requirement for any party to invoke cl. 11 before that party/defendant is allowed to terminate the CA (under cl. 10.3.1). Clause 10 deals with the defendant's right to terminate the CA and regulate the termination procedure without any reference to cl. 11. In a nutshell, at the risk of being repetitive, cls. 10 and 11 are independent or stand-alone provisions.

[96] On the other hand, cl. 11 is a dispute resolution provision where the Federal Court in *Safety Insurance Company* (*supra*) had termed it as the *Scott v. Avery* clause which provides for a dispute to be adjudicated by a specific procedure before any right of action can accrue between the parties. A

[97] In the present case, pursuant to cl. 11, procedurally the parties are enjoined to firstly negotiate in good faith and settle their dispute or difference amicably, failing which the parties are to refer their dispute to the State Government who shall use its reasonable endeavour to resolve the said dispute within 90 days from the date of referral. Finally, if the State Government shall fail to decide on the matter referred to them, either party is now at liberty to seek recourse through other legal process including litigation or arbitration, if agreed by the parties. B C

[98] Either party may invoke the dispute resolution procedure in cl. 11 of the CA.

[99] By virtue of cl. 11(c), the failure of either party to comply with cls. 11(a) and (b) would result in the disentitlement of that party to invoke any other legal process to settle their disputes or claims. D

[100] In our view, a pre-requisite for the invocation of the cl. 11 procedure is the existence of a dispute. If there is no dispute between the parties then there is nothing that can be referred to the said dispute resolution procedure. Thus, there can be no dispute on the validity of the exercise of the defendant's right to terminate the CA pursuant to cl. 10 until such termination has in fact occurred. E

[101] In a nutshell, the termination under cl. 10 must first occur before cl. 11 can be invoked to resolve any dispute concerning the termination. If the plaintiff challenges the validity of the termination of the CA pursuant to cl. 10, then a dispute with regard to the said termination will arise or has indeed arisen between the parties. Then either party may submit the dispute for resolution in accordance with the dispute resolution procedures in cl. 11. The purport of the procedures involved is further indication that cls. 10 and 11 cannot be interdependent. F G

[102] Secondly, we also agree with the submission that the entire dispute resolution procedure in cl. 11 would require a minimum of 90 days to complete. This would mean that until the dispute resolution procedure is completed, the plaintiff can nonchalantly continue with its default for a period of 90 days and the defendant will not be allowed to take any steps to mitigate the defaults of the plaintiff until the period of 90 days expires. H

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[103] The defendant is the local authority for Petaling Jaya. It has statutory obligations, duties and responsibilities to the public and must ensure that there are adequate parking facilities within Petaling Jaya for use by the public. It cannot wait 90 days or more for the completion of the dispute resolution procedure before it can take action to address the issues which may arise in respect of the parking facilities.

[104] We are also in agreement that the facts in *SPM Membrane* (*supra*), the authority relied by the plaintiff, are distinguishable from facts in the present case. In that case, the provisions in dispute were cls. 8 and 9 of the agreement between the parties which provide as follows:

> Clause 8 Termination
>
> 8(i) Termination by the State Government
>
> The State Government shall be entitled to terminate this agreement by giving thirty (30) days notice to the company if:
>
> (a) the equity structure and/or the structure of the board of directors of the company is modified without the State Government's written consent within one (1) year of the date of this agreement;
>
> (b) the company is unable to perform its services as provided under the agreement;
>
> (c) the company shall cease to or threatened to cease to carry out its operation or if in the opinion of the State Government, the company is not carrying on its operation with sound financial and commercial standards;
>
> (d) if a receiver and/or manager shall be appointed in respect of the Company's assets or any part thereof;
>
> (e) a petition shall be presented or any order be made or a resolution be passed for the winding up of the company or if the company enters into liquidation whether voluntarily or compulsorily;
>
> (f) at the time it becomes unlawful for the company to perform its obligations under this agreement; (legal proceedings of any kind be instituted against the company;
>
> (g) any judgment is obtained against the company.

[105] Meanwhile, cl. 9 provides:

Clause 9 Performance Review

(i) the parties hereby agree that the State Government may at any time during the contract period review the company's performance of its services under this agreement (upon such terms and conditions as the State Government and the company may hereafter agree in writing).

(ii) in the event that the State Government shall determine the company's performance of its obligations under this agreement as unsatisfactory; the company shall be given thirty (30) days to remedy the unsatisfactory situation.

(iii) if the State Government finds the unsatisfactory situation is not remedied at the end of thirty (30) days given under cl. 9.2, the State Government shall have the option of treating such unsatisfactory performance as an event of default which entitles the State Government to terminate this agreement pursuant to cl. 8.1(b) and accordingly the State Government shall be entitled to all reliefs provided under cl. 8.

[106] The respondent in *SPM Membrane* (*supra*) terminated the agreement pursuant to cl. 8(1)(b) of the same. It therefore had to establish that the appellant was unable to perform its services in accordance with the agreement. However, the respondent could not have claimed that the appellant was unable to perform its services if it did not invoke the procedure in cl. 9 and allow the appellant the opportunity to remedy the alleged deficiencies in its performance.

[107] Thus, the appellant argued that the review procedure under cl. 9 had to be invoked first before the respondent could terminate the agreement under cl. 8(1)(b). The Federal Court agreed with the appellant and held that cls. 8 and 9 of the agreement had to be read together. Consequently cl. 9 was a pre-condition to the issuance of a notice of termination under cl. 8 of the agreement. There is a clear link between cls. 8 and 9.

[108] Clauses 10 and 11 in our present case is not in the same mould as in *SPM Membrane*'s case (*supra*). Clause 10 of the CA has a built-in mechanism for the plaintiff to be notified of its defaults and given the opportunity to remedy its defaults before the CA can be terminated. Clause 11 on the other hand is a *Scott v. Avery* clause that can be invoked if the termination pursuant to cl. 10 is disputed. There is no link between cls. 10 and 11 of the CA. Termination under cl. 10 must have happened before cl. 11 can be invoked to resolve any dispute concerning the termination.

[109] We opined that in all the circumstances of the case, the defendant had properly applied cl. 10 to terminate the CA without the need to have prior recourse to cl. 11. Verily the termination was lawful.

The Consent Judgment

[110] We took note that a consent order was entered on 15 January 2018 during the pendency of the hearing of the present suit between the plaintiff and defendant in the High Court. The said consent order (dated 15 January 2018) required both parties to refer the disputes in the High Court action to the State Government of Selangor for mediation pursuant to cl. 11(b) and (c) of the CA.

[111] The disputes were then referred by both the parties to the State Government of Selangor for the said purpose of mediation.

[112] On 12 April 2018, the State Government of Selangor recommended that the parties proceed with the action in court.

[113] We thus opined that by reason of the consent order dated 15 January 2018 and both the parties participation in the mediation process, the plaintiff cannot now complain of any purported non-compliance with cl. 11 of the CA by the defendant.

Conclusion

[114] Having considered the facts and evidence in its entirety, we concluded that the plaintiff had failed to prove its case and that the defendant had indeed proven its counter-claim. There is absolutely no reason for us to interfere with the findings of the learned trial judge both on the facts and law. Hence, we affirmed the decision of the High Court and correspondingly dismissed the plaintiff's appeal with costs assessed at RM50,000, subject to the payment of the allocatur fee. Order accordingly.